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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1240

JAMES DI BARTOLO, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES M. LA ROCCA
115 Broadway
New York, New York 10006
Counsel for Petitioner

January 15, 1971

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IN THE

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October Term, 1970

No.

JAMES DI BARTOLO, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, JAMES DI BARTOLO, JR., prays that a writ of certiorari issue to review the judgment and opinion entered on December 17, 1970 by the United States Court of Appeals for the Second Circuit in the proceeding entitled United States of America, Appellee, v. James Di Bartolo, Jr., Appellant, Docket No. 36218.

Opinions Below

The Judgment of the District Court was affirmed by the Court of Appeals for the Second Circuit in open Court with no opinion. The Judgment of the Court of Appeals appears in the Appendix, page A1.

Jurisdiction

The Judgment of the Court of Appeals was entered on December 17, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Is mere presence of an individual at the scene of a crime sufficient in and of itself to support a conviction of aiding and abetting?

2. What quantum of evidence is required in order that a criminal case be submitted to the jury?

Statutory Provisions

Title 18, United States Code, Section 2113 provides in part:

> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Title 18, United States Code, Section 2, provides in part:

> (A) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Constitutional Provision Involved

The Constitution of the United States, Amendment V

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Statement of the Case

The Petitioner, James Di Bartolo, Jr., was convicted in the United States District Court for the Eastern District of New York of one count of violating Title 18, United States Code, Section 2113(a) and 2. The Indictment on which the Indictment was entered alleged that the Appellant, James Di Bartolo, Jr., along with Ronald Fiedler and Mario Paniccioli, willfully and knowingly attempted to enter the Williamsburgh Savings Bank, [illegible] Street, Brooklyn, New York, whose deposits were insured by the Federal Deposit Insurance Corporation, with intent to commit larceny in said bank.

The facts which underlie the question herein presented relate to the admissibility of evidence introduced against the Appellant. The Government, in support of this Indictment, alleged that at approximately five o'clock in the morning of July 12th, 1968, Detectives Frances Doriano and George Lidovits of the New York City Police Department were on a routine investigative tour in an unmarked patrol car at the corner of 68th Street and 3rd Avenue in Brooklyn (69 A).* Detective Doriano testified that when he and his brother detective reached the above intersection he heard a crash of glass, and, turning to his right, he observed three individuals. Doriano further related that at this point he heard a whistle and an exclamation to the effect of "Here comes the police" (69 A). At that, the detective proceeded down 3rd Avenue about one hundred feet and came upon two individuals behind a seven foot

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* Unless otherwise stated, the letter "A" introduces references to the Petitioner's Appendix on file in the United States Court of Appeals for the Second Circuit.

iron fence and one individual walking down 23rd Avenue towards 85th Street. The two individuals within the fenced area were identified as the defendants Findini and Paniccioli (52 A). It was Detective Deriennzo's testimony that Findini was first observed hanging from the bank window which had been broken. Defendant Paniccioli was seen at this time lying on the ground near the broken window in possession of a number of tools (54 A). Simultaneously Deriennzo observed the Petitioner Di Bartolo proceeding down 23rd Avenue towards 85th Street in what the detective described as a rapid manner of walking.

Upon direct examination, when asked by the Assistant United States Attorney whether he could determine which of the three individuals stated "Here comes the cops", Detective Deriennzo stated that it was "Di Bartolo, from my observation" (51 A). Under cross examination by Petitioner's Trial Counsel, the detective testified that as he first approached the scene, Di Bartolo was facing away from him and walking towards 85th Street (72 A) and further that he did not see the Petitioner's face until he stopped him (73 A). When asked by Trial Counsel whether he knew of his own knowledge whether it was Di Bartolo who made the statement "here comes the cops", the detective answered in the negative (74 A). In addition, Detective Deriennzo testified that he was not sure that it was the Petitioner who made the statement (75 A-76 A).

Detective George Lidowitz, who assisted Deriennzo, was not called to testify by either the prosecution or the defense. The only other witness to testify for the Government was Vincent J. Bitetto, an employee of the bank who related that when the bank was closed prior to the above

incident, it was locked and secured. Mr. Bitetto further related that the bank's funds were insured by the Federal Insurance Corporation.

None of the defendants testified in their own behalf.

REASONS FOR GRANTING THE WRIT

The evidence in the instant case was insufficient to sustain Petitioner's conviction. Mere presence at the scene of a crime coupled with knowledge that a crime was being committed does not constitute aiding and abetting.

The instant Petition presents two very important questions regarding the proper administration of Federal criminal justice. The decision of the Circuit Court of Appeals without opinion casts doubts as to the sufficiency of evidence necessary to support a conviction in a criminal case.

The first issue involves a rule which was apparently well settled prior to the Circuit Court's decision in the case at bar. That is, mere presence of an individual at the scene of a crime even coupled with knowledge that a crime is being committed is insufficient to support a conviction of aiding and abetting. *United States* v. *Gargullo*, 310 F. 2d 249 (2nd Cir. 1962); *Ramieres* v. *United States*, 363 F. 2d 33 (9th Cir. 1966); *Hendrix* v. *United States*, 327 F. 2d 971 (5th Cir., 1964). This Court, in *Nye Nissen* v *United States*, 336 U.S. 613 (1949) stated:

> "In order to aid and abet another to commit a crime, it is necessary that a defendant 'in some sort associate himself with the venture that he participate in it as in something that he wishes to bring about, that

he took by his action to make it succeed.' L. Hand, J., in United States v. Peoni, 2 Cir., 100 F. 2d 401, 402." (p. 619)

In the case at bar, it is respectfully submitted, there was no evidence that went beyond establishing mere presence at the scene of a crime coupled with knowledge that a crime was being committed. The net effect of Detective Derisenno's testimony was that he was unable to state of his own knowledge whether the Appellant Di Bartolo was the person who made the statement, "Here comes the cops" (74 A). It was further elicited from the detective that Di Bartolo did not have in his possession any "burglar's tools" nor any other implement which would in any way implicate him in the alleged attempted burglary (75 A). Detective Derisenno also testified that he did not know whether there was a fourth, fifth or sixth man in that area (75 A). Further cross-examination revealed the following:

"Q. You do not know whether somebody made that statement, 'Here comes the cops.' Someone you have never apprehended, is that right? A. No." (75 A)

Recross-examination produced the following:

"Q. Mr. Derisenno, from the moment you first saw or looked down 23rd Avenue, how many seconds did it take you to turn into 23rd Avenue, if it was seconds? A. A matter of a few seconds.

Q. And you testified, did you not, just a moment ago that after initially spotting Mr. DiBartolo and seeing him turn his head to the left, he turned and walked towards 85th Street? A. Yes.

Q. Based on the facts that you saw him turn his head to the left at about the time you heard a whistle,

is what you are basing your assumption on that he was the one that whistled, is that right? A. Yes.

Q. That is the only basis for your assumption, is that correct sir? A. No.

Q. Did you see him— A. At that exact time, yes.

Q. At the moment that you heard "here come the cops", he was walking away? A. No.

Q. His back was not turned— A. No.

Q. If I told you yesterday you testified when you heard that statement his back was turned, would you say I was wrong? A. No.

Q. Might you have testified to that? A. I do not recall.

Q. Would it have been correct if you testified to it? A. No.

Q. It would have been an error? A. Yes.

Q. Did you just state a moment ago, immediately after turning his head to the left he turned towards 86th Street and walked away? A. Yes.

Q. Was that not your testimony this morning? A. Yes.

Q. Did you not say, sir, that immediately after hearing the whistle, you heard "Here come the cops"? A. Yes.

Q. So I assume, "Here come the cops" came while his head was still turned to the left; is that what you are saying? A. Yes.

Q. And based upon that fact and that fact alone, sir, is what—is the reason you put down that Mr. DiBartolo whistled, is that correct? A. What is that?

Q. That is the basis of your assuming that Mr. DiBartolo whistled, is it not? A. Yes.

Q. Of your own knowledge, sir, you have no idea who whistled? A. I did not see him pucker his lips, no."

In the last analysis, the only Government witness to implicate the Petitioner was unable to affirmatively state that DiBartolo was the person who whistled and announced the arrival of the police officers. In fact, the only positive testimony with respect to DiBartolo was that he was present at the scene and upon the arrival of the police he walked away in a rapid manner (53 A).

The Trial Court in the instant case, in denying Petitioner's motion for a judgment of acquittal, placed great emphasis on the circumstances which surrounded Appellant's presence at the scene of the alleged crime (162-3 A). In rebuttal to counsel's contention that the Government had shown nothing more than mere presence, the Court noted such facts as the position of the Petitioner, the hour of the night, and the nature of the street. These factors, it is respectfully submitted, go to the question of whether Petitioner had knowledge that a crime was being committed and do not establish that the Petitioner was doing any act which would in any way make the venture successful.

In *Bailey v. United States*, 416 F. 2d 1110 (D.C. Cir., 1969) where the Circuit Court reversed the lower Court's denial of defendant's motion for judgment of acquittal it was held that mere presence at the scene of the crime would not sustain a conviction even where the defendant took flight after the crime was committed. Although the *Bailey* Court took cognizance of the fact that under particular conditions flight may be the basis for an inference of consciousness of guilt, it held that

> " . . . guilt, as a factual deduction, must be predicated upon a firmer foundation than a combination of unelucidated presence and unelucidated flight." (p 1115)

The only factor, therefore, which distinguishes the instant case from the *Bailey* case, which was dismissed for insufficiency where only presence and knowledge were shown, is Detective Derienzo's testimony that someone whistled and shouted "here comes the cops". The issue presented to the Circuit Court was whether testimony as equivocal as Detective Derienzo's, was a proper basis on which the question of Di Bartolo's guilt or innocence could be submitted to the jury.

The effect of the Circuit Court's decision in the instant case has been to abridge the well established standard that mere presence will not sustain a criminal conviction. This Court is asked to review the Circuit Court's misapplication of these critical principles.

The second issue presented by this Petition relates to the question of how much evidence is required in order that a criminal case may be submitted to the jury. In terms of the instant case, the issue is whether Detective Derienzo's testimony that someone whistled and shouted "here comes the cops" was sufficient to present to the jury to determine Petitioner's participation or guilt beyond a reasonable doubt. The applicable standards with respect to what quantum of evidence is necessary to present a criminal case to the jury are unsettled in the Second Circuit. *United States* v. *Leitner*, 202 F. Supp. 688 (S.D.N.Y. 1962); *United States* v. *Melillo*, 275 F. Supp. 314 (E.D.N.Y., 1967).

As was stated in *Melillo*, *supra*,

> "The uncertainty has resulted from a dispute about whether there is a greater burden of production in criminal cases than in civil cases."

Despite the aura of confusion in the Second Circuit, the majority position has consistently supported the "beyond a reasonable doubt" test. *United States* v. *Conti*, 339 F. 2d 10 (6th Cir., 1964); *Biggs* v. *United States*, 280 F. 2d 949 (5th Cir., 1960); *Cartwright* v. *United States*, 335 F. 2d 919 (10th Cir., 1964).

In *Melillo*, *supra*, the Court took cognizance of the fact that this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946) and *Mortensen* v. *United States*, 322 U.S. 369 (1944), "seems to have thrown its weight behind the majority position" in stating:

> "The verdict in a criminal case is sustained only when there is 'relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt,' that the accused is guilty." 328 U.S. at p 787 N 4.

The Circuit's affirmance of Petitioner's conviction below without opinion increases the spectrum of doubt in the Second Circuit with respect to this issue. In the case at bar there can be no question but that there was no substantial evidence upon which the jury might have reasonably based a finding that the Petitioner was guilty beyond a reasonable doubt.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

James M. La Rossa
115 Broadway
New York, New York 10006
Counsel for Petitioner

January 15th, 1971

APPENDIX

Judgment of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of December one thousand nine hundred and seventy.

Present:

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JAMES DI BARTOLO, RONALD FIASCHI and MARIO PASSACHIA,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Appendix—Judgment of United States Court of Appeals for the Second Circuit

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1240

JAMES DI BARTOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a jury trial in the United States District Court for the Eastern District of New York, petitioner and codefendants Fiadini and Paniccioli were found guilty of attempting to enter a federally insured bank with intent to commit larceny, in violation of 18 U.S.C. 2113(a) and 2 (5A, 207A).[1] On February 5, 1970, petitioner was sentenced for treatment and supervision under the Youth Corrections Act (3A, 214A-215A). The court of appeals affirmed without an opinion (Pet. App.).

[1] "A" refers to the Appellant's Appendix in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

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The Williamsburg Savings Bank is located on the southeast corner of 86th Street and 23rd Avenue in Brooklyn, New York. On the 23rd Avenue side of the building there are three large windows set back about a foot from the building line, and in front of the windows there is an elevated concrete platform surrounded by a fence seven feet high (54A–55A; Gov. Ex. 2–B). There was testimony by a bank employee that its funds were insured by the Federal Deposit Insurance Corporation (16A–17A), and that prior to the incident hereafter related the bank was locked and secured (12A, 15A–16A).

Detective Derienzo testified that on July 13, 1968 at about 5:00 a.m. he and another detective (Lidowitz)[1] were on an investigative tour in an unmarked patrol car (48A). Daylight was just starting to break, there was no traffic, and the streets were deserted (59A, 72A, 136A). As the two detectives approached the intersection where the bank is located, Derienzo heard a crash of glass, turned to his right on 23rd Avenue, and observed three men (49A). Derienzo saw petitioner, who was standing on the sidewalk with his back to the fence, turn his head to the left toward Fiadini and Paniccioli, who were behind the fence (50A, 82A, 136A–137A). Immediately thereafter Derienzo heard a whistle and the statement: "Here comes the cops". (49A, 73A–74A, 137A). Derienzo testified that to the best of his knowledge and observation

[1] Lidowitz was not called to testify by either side. He was, however, available and this was known to defense counsel, who decided not to call him (172A–175A).

it was petitioner who whistled and made the warning statement (51A, 146A–148A), although he could not state positively that petitioner was the person who had done so (74A, 76A, 148A).

At the time of the whistle and warning Fiadini was hanging from a bank window, a 24" x 18" section of which had been broken (52A, 56A–57A, 116A). Broken glass and a concrete slab were found in the interior of the bank (18A, 57A, 60A). Under or beside Paniccioli, who was in a crouching position on the concrete platform, Derienzo found a pry bar, two crow bars, a large screwdriver, and five gloves (54A, 57A, 82A, 107A, 125A).

Immediately after Derienzo heard the whistle and the warning statement, petitioner turned and walked swiftly away toward 85th Street in the opposite direction from the police car (49A, 53A, 137A–138A). Derienzo ordered petitioner to stop, and the three codefendants were placed under arrest (53A–54A, 70A). The court charged (188A–189A):

> The mere presence of the defendant, James DiBartolo, at the scene of the crime, even though he had knowledge that a crime was being committed will not suffice to constitute aiding and abetting, unless you are convinced beyond a reasonable doubt that Mr. DiBartolo was doing something to forward the crime and with the parties present rather than a mere knowing spectator. The defendant need not personally perpetrate every act constituting the offense charged in order to become guilty.

> Now, in short, if you find that at the time the policeman came by there he was acting as lookout beyond a reasonable doubt, then he would be guilty. If he was just walking along and saw a crime being committed or saw something being done, curiously stood and watched, he would not be guilty.

Petitioner did not object (nor does he now) to this instruction as a correct statement of the law (195A).

He contends, however, that the case against him should not have been submitted to the jury since there was no substantial evidence from which it could determine beyond a reasonable doubt that he had actively assisted or participated in the crime. See *Nye & Nissen v. United States*, 336 U.S. 613, 619. The totality of the circumstances, however—the deserted street, the early hour, and petitioner's position vis-a-vis the codefendants—belies the theory that he was merely a bystander and supports the jury's conclusion that petitioner was at the scene as a lookout. This is buttressed by Derienzo's testimony that it was petitioner who had whistled and warned the others, even though this particular fact may not have been established beyond a reasonable doubt since Derienzo could not say positively that petitioner was the man. The requirement of proof beyond a reasonable doubt, however, "operates on the whole case, and not on separate bits of evidence each of which need not be so proven". *United States* v. *Valenti*, 134 F. 2d 362, 364 (C.A. 2), certiorari denied, 319 U.S. 761.

Here the entire set of circumstances warranted the inference that petitioner aided and abetted the attempted entry into the bank for purposes of larceny.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1971.

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[1] *Bailey* v. *United States*, 416 *F.* 2d 1110 (C.A.D.C.), upon which petitioner relies (Pet. 8), is distinguishable, since there the accused had walked away from his robber companion before the crime occurred, thus casting grave doubt on the theory that he had functioned as a lookout. *Id.* at 1114.

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